

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

RONALD WISNER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

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APPELLANT'S REPLY BRIEF

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RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. ARGUMENT

### 1. The State failed to authenticate the video and photos.

“It is fundamental that evidence must be authenticated before it is admitted.” State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) (overruled on other grounds by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012)). Before admission of a photograph or video recording, a witness must be able to give some indication as to **when**, where, and **under what circumstances** the photograph or video recording was taken and that it **accurately** portrays the subject illustrated. State v. Tatum, 58 Wn.2d 73, 75, 360 P.2d 754 (1961); Saldivar v. Momah, 145 Wn. App. 365, 399, 186 P.3d 1117 (2008). Unless a photo or video actually depicts what it purports to depict, it is not relevant. See Bashaw, 169 Wn.2d at 141.

This case presents a “when” problem. Only if the photos and video depicted April 4, 2013, the date of the fraudulent transaction, were they relevant. See id. at 142 (“results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results.”). The State failed to establish that the photos and videos depicted April 4, 2013. The State elicited no testimony to support its position that the video and photos depicted April 4, 2013.

Rather, the prosecutor simply presumed they did and told Ms. Wooden, the bank teller, that the video was from April 4, 2013. RP 82 (“I’m going to ask you questions pertaining to the events of April 4<sup>th</sup>, 2013); 90 (“Now, did you get an occasion to watch the video of the transaction that you did involving this check on April 4<sup>th</sup>, 2013?”). Ms. Wooden admitted, however, that she did not know if the video or photos depicted April 4, 2013, or whether the timestamp on the evidence was accurate. RP 116-17. She did not know how the video or photos were made, or how the evidence came into the State’s possession. RP 94-95, 115. Thus, her testimony did authenticate the timestamped photos and video.

The State fails to grapple with this problem. Instead, the State argues this case is similar to Tatum and State v. Sapp, 182 Wn. App. 910, 332 P.3d 1058 (2014). These two cases are dissimilar.

Sapp was a prosecution for sex crimes against a child. Sapp, 182 Wn. App. at 912. The State possessed pictures and video of the defendant abusing a child. Id. At trial, the child’s grandmother, who was familiar with both the defendant and the child, testified that it was indeed the defendant and the child in the photos and video. Id. at 913. On appeal, this Court rejected the argument that the grandmother did not authenticate the video or photos because she was not present at the time the video and photos were made. Id. at 914-17. That the grandmother was able to

identify the people, the victim's approximate age, and the location was sufficient. Id. at 916. This witness, unlike Ms. Wooden, was able to identify when the recordings were made based on her familiarity with the ages of the people. Moreover, there is no discussion in Sapp about timestamps on the photos or video. Thus, Sapp is materially distinguishable.

Tatum is also unlike this case because in that case a witness was able to testify as to the process used in creating the evidence. Tatum, 58 Wn.2d at 75 (photo authenticated where witness identified location in photo and another witness testified about the store's practice of photographing customers). This is consistent with the rules of evidence, which states the authentication requirement is met when it is shown that the "process or system [which created the evidence] produces an accurate result." ER 901(b)(9). Here, no witness, certainly not Ms. Wooden, testified that the surveillance system or computer program, from which the video and photos were apparently derived, accurately captured the correct date.

Bashaw, though not involving photos or video, is instructive on this point. Bashaw, 169 Wn.2d at 142-43. There, the jury found that the defendant delivered controlled substances within 1,000 feet of a school bus route stop. Id. at 139. To prove this, the State introduced testimony

from a detective who testified he used a measuring device to determine the distance between the delivery and the stop. Id. at 138. In overruling the defendant's objection to admitting this evidence, our Supreme Court held that the trial court erred because the State produced no evidence proving that the measuring device was functioning properly and produced accurate results. Id. at 140. The court analogized to previous cases holding that speed measuring devices, such as radar devices, must be authenticated before admitting their results. Id. at 141-42.

Similarly, there was no showing whatsoever that the device or devices that produced the timestamped video and photos were accurate. There was not even testimony about how the State came into possession of the video or about how the photos were produced. Thus, as in Bashaw, the trial court erred in overruling Mr. Wisner's express objections to the photos and his implied objection to the video from which these photos were derived. See also Washington v. State, 406 Md. 642, 961 A.2d 1110, 1117 (2008) (State did not lay adequate foundation to authenticate video and photos which purported to depict events surrounding a shooting because there was no testimony about the process used to create them); Saldivar, 145 Wn. App. at 399-400 (news video not authenticated because plaintiff did not call any witnesses who could testify as to when, where, and under what circumstances the recording was made).



The errors in admitting the photos and video were prejudicial. Br. of App. at 13-14. The State does not argue otherwise. Accordingly, this Court should reverse.

**2. If counsel did not adequately preserve his challenge to the video or photos, Mr. Wisner was deprived of his right to effective assistance of counsel.**

Defense counsel objected to the admission of the photos,<sup>1</sup> which were derived from the video,<sup>2</sup> and to the playing of the video. RP 95, 102-03. Despite lodging these objections and creating a record showing the lack of authentication, counsel did not specifically object when the State moved to admit the video. RP 113.

If trial counsel did not adequately preserve the challenges to the evidence, this Court should hold that Mr. Wisner was deprived of effective assistance of counsel because an objection would have been properly sustained to this prejudicial evidence. Br. of App. at 14-16. Ineffective assistance of counsel requires a showing of deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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<sup>1</sup> Ex. 6-10.

<sup>2</sup> Ex. 5.

Concerning deficient performance, the State does not argue that there was any tactical reason for Mr. Wisner's counsel to not object. Rather, the State only argues counsel was not deficient because the evidence was properly authenticated. Br. of Resp't at 22. As explained earlier, the State is wrong.

Concerning prejudice, the State again makes no argument, impliedly conceding the issue. Br. of Resp't 22.

Assuming counsel did not adequately preserve his objections to the evidence, Mr. Wisner establishes ineffective assistance of counsel. This Court should reverse.

**3. Alternatively, the Court should remand for a new sentencing hearing because the trial court did not inquire into Mr. Wisner's ability to pay legal financial obligations.**

The State does not disagree that the trial court failed to inquire into Mr. Wisner's ability to legal financial obligations. Br. of Resp't at 22-24. Rather, the State argues this Court should excuse the error because Mr. Wisner did not object. Br. of Resp't at 23-24. The State does not respond to Mr. Wisner's argument that this Court should exercise its discretion and reach the issue. In fact, the State provides no argument for why this Court should not exercise its discretion and reach the issue, as our Supreme Court recently did. State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). This Court can properly do so under RAP 2.5(a). Id. The

Court can also do so under RAP 1.2(a), which states the rules of appellate procedure “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” Id. at 841 (Fairhurst, J., concurring). Doing so will promote justice and ensure that the will of the people, as expressed in RCW 10.01.160(3), will be done.

**4. The State’s recitation of the “facts” fails to comply with the rules of appellate procedure**

The rules of appellate procedure require that each factual statement be supported by a citation to the record. RAP 10.3(a)(5) (“Reference to the record must be included for each factual statement.”). “Allegations of fact without support in the record will not be considered by an appellate court.” Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 513, 857 P.2d 283 (1993). “The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.” Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

In its briefing, the State fails to comply with this rule. Many of its factual assertions are not supported by a citation to the record. See, e.g., Br. of Resp’t at 3-10. Rather, in some places, the State places its citations at the end of paragraphs. Br. of Resp’t at 3-9. This violates RAP 10.3(a)(5). This Court should disregard factual assertions by the State

which are not supported by citation to the record.

**B. CONCLUSION**

The photos and video were not authenticated and should not have been admitted. Because the error was prejudicial, this Court should reverse Mr. Wisner's conviction. Alternatively, the Court should remand for a new sentencing hearing to determine Mr. Wisner's ability to pay legal financial obligations.

DATED this 24th day of August, 2015.

Respectfully submitted,

/s Richard Lechich  
Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 46597-3-II
	)	
RONALD WISNER,	)	
	)	
APPELLANT.	)	


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COWLITZ COUNTY PROSECUTING ATTORNEY	(X)	E-SERVICE VIA
312 SW 1 <sup>ST</sup> AVE		COA PORTAL
KELSO, WA 98626-1739		

[X] RONALD WISNER	(X)	U.S. MAIL
794395	( )	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	( )	_____
PO BOX 769		
CONNELL, WA 993261		

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF AUGUST, 2015.

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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

# WASHINGTON APPELLATE PROJECT

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